

1 Neal J. Fialkow (State Bar No. 74385)
2 LAW OFFICE OF NEAL J. FIALKOW INC.
3 215 North Marengo Avenue, Third Floor
4 Pasadena, California 91101
5 Telephone: (626) 584-6060
6 Facsimile: (626) 584-2950
7 Email: nfialkow@pacbell.net

8 Aaron C. Gundzik (State Bar No. 132137)
9 GARTENBERG GELFAND HAYTON
10 & SELDEN, LLP
11 801 South Figueroa Street, Ste. 2170
12 Los Angeles, CA 90017
13 Telephone: (213) 542-2100
14 Facsimile: (213) 542-2101
15 Email: agundzik@gghslaw.com

16 Sahag Majarian II (State Bar No. 146621)
17 LAW OFFICE OF SAHAG MAJARIAN, II
18 18250 Ventura Boulevard
19 Tarzana, California 91356
20 Telephone: (818) 609-0807
21 Facsimile: (818) 609-0892
22 Email: sahaii@aol.com

23 Attorneys for Plaintiff Elisa Lopez,
24 individually and on behalf of all others similarly situated

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

29 ELISA LOPEZ, Plaintiff, individually and on
30 behalf of all others similarly situated

31 Plaintiff,

32 vs.

33 TANGOME, INC., a Delaware Corporation;
34 DOES 1 through 10,

35 Defendants.

Case No.:

**COMPLAINT FOR DAMAGES AND
INJUNCTIVE RELIEF FOR
VIOLATIONS OF 47 U.S.C. § 227;
DEMAND FOR JURY TRIAL**

CLASS ACTION

E-FILING

FILED

DEC 12 2012

Richard W. Wleking
Clerk, U.S. District Court
Northern District of California
San Jose

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HRL

CV 12- 6300

INTRODUCTION

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2 1. This class action is brought to recover damages and obtain injunctive relief
3 for Defendants' violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C.
4 § 227.¹ As alleged below, Defendants have engaged in a practice of sending unwanted text
5 messages to the mobile phones of Plaintiff and thousands of others. Such conduct is
6 prohibited under the TCPA and pursuant to its sub-sections, Plaintiff and the class are
7 entitled to recover damages of no less than \$500 per violation and an injunction prohibiting
8 future violations.

PARTIES

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10 2. Plaintiff Elisa Lopez is an individual and a resident of Santa Barbara,
11 California.

12 3. Defendant TangoMe, Inc. ("TangoMe") is a Delaware corporation, whose
13 principal place of business is located in Palo Alto, California.

14 4. The defendants named herein as Does 1 through 10 are sued by said fictitious
15 names, as their true names and capacities are unknown to Plaintiff. Plaintiff believes that
16 one or more Doe Defendants are unknown persons or entities that were under contract with
17 Defendant TangoMe to provide marketing or other services related to the text messages at
18 issue. Plaintiff will amend this Complaint to allege the Doe Defendants' true names and
19 capacities when they are ascertained. Plaintiff is informed and believes and based upon such
20 information and belief, alleges that each of the Doe Defendants is responsible in some
21 manner for the wrongful conduct alleged herein.

JURISDICTION

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23 5. The Court has subject matter jurisdiction over this action pursuant to 28
24 U.S.C. § 1331 in that it arises under the statutes of the United States. Plaintiff pleads a
25 violation of 47 U.S.C. § 227.

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27
28 ¹ Unless otherwise indicated, all statutory references herein are to Title 47 of the United States Code.

1 13. In 1992, the TCPA was enacted to address the problem of unwanted
2 telephone calls and faxes. The TCPA prohibits most unwanted automated calls to
3 residential lines and junk faxes, it also prohibits spam texts:

4 It shall be unlawful for any person within the United States if the recipient is
5 within the United States -- (A) to make any call (other than a call made for
6 emergency purposes or made with the prior express consent of the called party)
7 using any automatic telephone dialing system . . . (iii) to any telephone number
8 assigned to a . . . cellular telephone service.

9 47 U.S.C. § 227(b)(1)(A)(iii).

10 14. Spam text messages violate the TCPA because they are sent using an
11 “automatic telephone dialing system” without the “prior express consent of the called party.”

12 15. The TCPA grants persons a private right of action and allows for the
13 imposition of injunctive relief and damages equal to the greater of actual damages and \$500
14 for each violation.

15 16. On November 24, 2012 at approximately 6:51 p.m., Defendant TangoMe and
16 Doe Defendants caused a text message advertising TangoMe’s products and services to be
17 sent to Plaintiff’s mobile telephone. The message read:

18 Get Tango at <http://tango.net/r/a> for FREE texting, voice calls, video calls, and
19 games on your iPhone, Android, WP7, or PC!

20 17. When Plaintiff received the forgoing message, she was in Santa Barbara,
21 California.

22 18. On information and belief, this text message was sent using an automatic
23 dialing system. It was sent to numerous other telephone numbers at the same time that it
24 was sent to Plaintiff.

25 19. Plaintiff did not give her express consent to receive Defendants’ text message
26 before it was sent. Nor, has Plaintiff subsequently consented to receiving text messages
27 from Defendants.

28 20. The message was not sent for emergency purposes.

CLASS ALLEGATIONS

21. Plaintiff brings this action pursuant to Federal Rule of Civil Procedure 23 as the representative of a class consisting of all persons to whom Defendants caused text messages to be sent without prior express consent utilizing an automatic dialing system.

22. On information and belief, Defendants caused illegal text messages to be sent to many thousands of persons and entities. The class is so numerous that joinder of all members in impracticable.

23. A class action is the only realistic means for individual members to be compensated for Defendants' violations of the TCPA. The expense to each class member of litigating their claims against Defendants individually effectively precludes class members from obtaining any remedy for Defendants' violations.

24. The following questions of law and fact, among others, are common to the class and predominate over questions affecting only individual members:

- a. Whether Defendants caused a large number of unauthorized text messages to be sent to Plaintiff and others.
- b. Whether Defendants' text messages were sent for emergency purposes.
- c. Whether Defendants used an automatic dialing service to send such messages.
- d. Whether Defendants confirmed that the recipients of its text messages had given Defendants prior express consent.
- e. Whether the TCPA applies to text messages.
- f. Whether Defendants acted willfully, such that treble damages are warranted under section 227(b)(3)(B).

25. Plaintiff's claims are typical of the claims of other class members.

26. Plaintiff will fairly and adequately represent the interests of the Class.

Plaintiff is represented by competent and experienced counsel and Plaintiff is committed to vigorously pursue her claims and the claims of all class members.

1 27. In light of the predominance of questions, the expected size of the class and
2 the small amount of damages recoverable by each individual member, a class action is
3 superior to other available methods for fairly and efficiently adjudicating the controversy.

4 **FIRST CLAIM FOR RELIEF**

5 **Damages for Violation of the TCPA**

6 28. Plaintiff incorporates by this reference, as if fully set forth herein, the
7 allegations in paragraphs 1 – 27, above.

8 29. At a time when Defendants were within the United States, Defendants and
9 their agents caused the above-referenced text message to be sent to Plaintiff and other
10 members of the class.

11 30. When Plaintiff and other class members received the unauthorized text
12 message, they were in the United States.

13 31. Plaintiff and the class members did not give Defendants express consent to
14 receiving the messages before they were sent.

15 32. Defendants and their agents used an automatic telephone dialing system to
16 send the messages to Plaintiff and other class members.

17 33. The messages were sent to Plaintiff's and other class members' cellular
18 telephones.

19 34. Defendants' conduct was the proximate and actual cause of monetary loss
20 and other damage incurred by Plaintiff and the class members. Pursuant to section
21 227(b)(3)(B), Plaintiff and the class members are entitled to recover the greater of the
22 amount of their monetary loss or \$500 per violation.

23 35. Defendants willfully and knowingly violated section 227(b). Accordingly,
24 pursuant to section 227(b)(3), Plaintiff requests that the Court award her and the class treble
25 damages.

SECOND CLAIM FOR RELIEF

Injunctive Relief for Violation of the TCPA

36. Plaintiff incorporates by this reference, as if fully set forth herein, the allegations in paragraphs 1 – 35, above.

37. Pursuant to Section 227(b)(3)(A), in an action based upon a violation of the TCPA, Plaintiff may seek an injunction precluding future violations.

38. As alleged above, Defendants have violated the TCPA. Their past conduct in doing so demonstrates that it is necessary for the Court to issue an injunction to prohibit future violations of the TCPA.

39. Accordingly, Plaintiff requests that the Court enter an order permanently enjoining Defendants and all those acting on their behalf from sending unauthorized text messages in violation of the TCPA.

PRAYER FOR RELIEF

Wherefore, Plaintiff prays for relief as follows:

1. For the actual monetary loss incurred by her and the class or \$500 per violation, whichever is greater;

2. For an an order permanently enjoining Defendants and all those acting on their behalf from sending unauthorized text messages in violation of the TCPA.


3. For an order certifying the class as defined above;

4. For reasonable attorney's fees and costs

5. For such other and further relief as the Court deems just and proper.

Dated: December 11, 2012

GARTENBERG GELFAND HAYTON
& SELDEN LLP



Aaron C. Gundzik
Attorneys for Plaintiff

DEMAND FOR JURY

Plaintiff hereby demands a trial by jury.

Dated: December 11, 2012

GARTENBERG GELFAND HAYTON
& SELDEN LLP



Aaron C. Gundzik
Attorneys for Plaintiff